

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE: CERTAIN ASSETS OF § NO. 6:02CV223
ALLEN PETTY, JR., a.k.a. AL PETTY § (Judge Ward)

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**MOTION TO CONVERT TEMPORARY RESTRAINING ORDER
TO A PRELIMINARY INJUNCTION**

The United States of America, by and through its United States Attorney for the Eastern District of Texas and the undersigned counsel, moves this Honorable Court to convert the Temporary Restraining Order (TRO) previously entered by the Court to a Preliminary Injunction (PI), pursuant to 21 U.S.C. § 853(e), as incorporated by 18 U.S.C. § 982(b)(1).

I.

On April 4, 2002, the government filed a motion for entry of a TRO seeking restraint of certain assets belonging to or under the control of Allen Petty, Jr., a.k.a. Al Petty (Petty), that constituted the proceeds of an alleged Ponzi scheme under investigation in the Eastern District of Texas. The motion was granted, and the TRO was entered on April 4, 2002. Petty was served at the offices of his counsel, Robert W. Lee, in Tyler, Texas, on April 5, 2002. The order granting the TRO set the matter for hearing on April 11, 2002. On April 9, 2002, the United States moved to convert the TRO to a preliminary injunction (PI). The Court heard the matter on April 11, 2002, and granted the motion to convert on April 17, 2002.

On May 20, 2002, the United States sought temporary restraint of additional assets related to the scheme. The affidavit of Special Agent James A. Hersley of the Federal Bureau of Investigation (FBI), attached to the Motion for the Entry of a Pre-Indictment Temporary Restraining Order and incorporated by reference therein, set forth probable cause to believe that Petty had been perpetuating a Ponzi scheme in the Eastern District of Texas, in furtherance of

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which he used the United States mails and interstate wires. Likewise, the affidavit set forth probable cause that Petty has conducted financial transactions designed to conceal the ownership of the proceeds of the scheme and has conducted financial transactions that involved funds from the scheme in excess of \$10,000. As set forth in the motion and affidavit, the plan marketed by Petty may violate the mail fraud and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, and the transfers involving the proceeds thereof may violate the federal money laundering statutes, 18 U.S.C. §§ 1956 and 1957. Thus, the United States sought to restrain the assets pending federal investigation of Petty based upon indications that the assets were forfeitable pursuant to 18 U.S.C. § 982(a)(1) and (8).

The motion for entry of a TRO was granted, and the TRO was entered on May 20, 2002. The order granting the TRO set the matter for hearing at 1:30 p.m. on May 28, 2002, at the United States Courthouse in Tyler, Texas. The government immediately sought to serve Petty and the entities affected by the TRO. Petty's counsel of record, Robert W. Lee, was provided with a copy of the TRO by facsimile transmission on May 20, 2002, and accepted formal service for his client on May 22, 2002. The TRO was served on Daniel Petty and Naomi Petty, who have signature authority over one of the frozen accounts, on May 22, 2002.

On May 20, 2002, Petty's counsel of record advised that he would soon be joined by co-counsel from Houston. He also advised that co-counsel had an unavoidable conflict on May 28, 2002, the date on which the hearing was scheduled. Counsel for the government advised that she would not oppose an extension of the TRO, but requested that it continue until at least June 13, 2002, because of conflicting trial and grand jury settings. Counsel agreed to file a joint motion to extend the TRO. On May 22, 2002, Richard Haynes and Olney G. Wallis filed a notice of

appearance as co-counsel for Petty, and on May 23, 2002, the parties filed a joint motion to extend the TRO until at least June 13, 2002. The Court granted the motion and extended the TRO until June 12, 2002, on which date the matter will be heard. The government now moves to convert the TRO into a preliminary injunction (PI).

II.

The provisions of 21 U.S.C. § 853(e) govern this proceeding. This section provides the following with respect to preliminary injunctions:

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good

cause shown or unless an indictment or information described in subparagraph (A) has been filed.

21 U.S.C. §853(e)(1).

Accordingly, the United States moves the Court to convert the TRO to a PI that will be effective for ninety (90) days, pursuant to 18 U.S.C. §982(b)(1), incorporating 21 U.S.C. §853(e). In making this request, the government re-alleges and re-asserts the probable cause of the original TRO, described in the affidavit of Special Agent James A. Hersley submitted with the Motion for the Entry of a Pre-Indictment TRO, and incorporates said affidavit as if fully set out herein.

The United States further requests that the Court hear this motion at the time set for hearing the TRO, so that the government may present evidence indicating that there is a substantial probability that the United States will prevail on the issue of forfeiture; that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and that the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered. As set forth in 21 U.S.C. § 853(e)(3), the Court may receive and consider evidence and information at this hearing that would be inadmissible under the Federal Rules of Evidence.

Pursuant to Fed.R.Civ.P. 65(c), the United States of America as Movant is not required to post bond or security.

III.

For the foregoing reasons, the United States respectfully requests that the current TRO be converted to a PI that will be in effect for a period of 90 days following entry of an order of conversion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

On this 29th day of May, 2002, I, Traci L. Kenner, Assistant United States Attorney for the Eastern District of Texas, attorney of record for the United States of America, do certify that a true and correct copy of the foregoing was mailed from Tyler, Texas to: Mr. Robert W. Lee, Attorney at Law, 121 S. Broadway, # 668, Tyler, Texas 75702; Mr. Richard Haynes, 4300 Scotland St., Houston, Texas, 77007; Mr. Olney G Wallis, 4300 Scotland St., Houston, Texas, 77007, and was sent by facsimile transmission to Mr. Lee at (903) 526-7436, Mr. Haynes at (713) 863-9934, and Mr. Wallis at (903) 880-2442.



Traci L. Kenner